No. 3810

IN THE 5

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM P. HOPKINS and I. A. SHAFFER, JR., as Trustees of the Estate of A. C. HOPKINS, Deceased
Appellants

v.

EARL C. BRONAUGH, as Trustee in Bankruptcy of the Estate of MORRIS BROTHERS, INC., Bankrupt
Appellee

Brief of Appellants

Upon Appeal from the United States District Court for the District of Oregon

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LIST OF CASES CITED.

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STATEMENT OF THE CASE.

This is a dispute over the ownership of $50,000 of municipal bonds which came into the possession of the appellee as trustee in bankruptcy of Morris Bros., Inc., a Portland bond house, after its bankruptcy adjudication in December, 1920. Appellants had entered into a purchase contract for these bonds

with the Morris Company and before the doors were closed had paid the purchase price in full and the Morris Company had collected together the purchased bonds, labelled them with the purchaser's name and refrained from placing them in the mail only because of the disturbed conditions due to the impending bankruptcy. (Record, p. 110.)

The referee after much deliberation concluded that under the terms of the purchase contract as he found them to be, delivery of the bonds was essential to the passing of title, and upheld the trustee in refusing to turn them over. The District Court affirmed the referee's order, but later, upon appellants' application, vacated the order of affirmance and sent the proceeding back to the referee for a rehearing. The referee upon rehearing adhered to his original decision. The District Court upon review affirmed the referee's order, adjudging that title had not passed; and a decree was entered disallowing appellants' claim to the bonds. The appeal to this court questions the correctness of this order and decree.

The facts are not in dispute. Because of the informal character of the several hearings before the referee, the record does not give the history of the transaction in a very orderly fashion; but the essential facts may be summarized as follows:

The Morris Company closed its doors December 24, 1920. A day or two before, the active head of

the concern, John L. Etheridge, had left the city hastily, and Fred S. Morris had taken charge temporarily. At his direction, voluntary bankruptcy was resorted to and a receiver was appointed December 27, 1920.

Appellants, William P. Hopkins and I. A. Shaffer, Jr., are trustees of the estate of A. C. Hopkins, deceased. Mr. Hopkins lives at Spokane, Washington, and Mr. Shaffer at Lock Haven, Pennsylvania. Having made previous purchases of bonds for the estate from the Morris Company and knowing that the estate would soon have a substantial sum for investment, Mr. Hopkins went to Portland on December 9, 1920, for the purpose of buying municipal securities. He spent a part of the day with Fred Glenn, a representative of the Morris Company, and an agreement was reached (subject to the approval of Mr. Hopkins' co-trustee, Mr. Shaffer,) for the purchase of the following bonds:

Rigby School District No. 5, 1932 maturity	$ 3,000.00
Rigby School District No. 5, 1933 maturity	4,000.00
Rigby School District No. 5, 1934 maturity	3,000.00
Buhl Highway District	10,000.00
Heyburn-Paul District	5,000.00
Fremont & Madison Joint School District, 1935 maturity	3,000.00
Fremont & Madison Joint School District, 1936 maturity	3,000.00

Fremont & Madison Joint School District, 1937 maturity	3,000.00
Fremont & Madison Joint School District, 1938 maturity	3,000.00
Fremont & Madison Joint School District, 1939 maturity	3,000.00
Bonner County, Independent School District No. 1, 1932 maturity	3,000.00
Bonner County, Independent School District No. 1, 1933 maturity	3,000.00
Bonner County, Independent School District No. 1, 1934 maturity	4,000.00
Port of Bay City, 1934 maturity	10,000.00

The contract of purchase was not reduced to writing, although Mr. Glenn made notes of the details of the transaction, which notes were introduced in evidence (Record, p. 177). When the bargain was concluded, Mr. Hopkins stated that the Estate would not be in funds until December 23 or 24, at which time it would be prepared to pay for and take up the bonds; and that when this was done the bonds were to be sent to the Estate's office at Lock Haven, Pennsylvania. Mr. Glenn was directed to forward at once to the co-trustee, Mr. Shaffer, descriptive matter and legal opinions covering each issue of bonds selected so that Mr. Shaffer's approval of the purchase could be secured. This was done the following day, December 10, 1920, Mr. Hopkins also sending Mr. Shaffer a list of the bonds purchased and the prices to be paid.

In the letter of December 10, 1920, with which Mr. Glenn thus transmitted circulars and legal

opinions to Mr. Shaffer, the statement was made that:

> "The above mentioned bonds are to be delivered to you about the 23rd or 24th and we are to send the same by registered mail insured addressed to the Estate of A. C. Hopkins, Lock Haven, Pennsylvania."

Mr. Glenn testified that this letter was dictated from the notes made during the conversation with Mr. Hopkins the day before; and he explained that the statement of the letter regarding delivery "about December 23 and 24," referred to Mr. Hopkins' explanation that the Estate would be ready to pay for and take up the bonds at that time; and he (Glenn) merely repeated the direction Hopkins had given him as to the disposition of the bonds when they were so paid for and taken up. (Record, pp. 156-163.)

Both Hopkins and Glenn understood that Hopkins was to make payment for the bonds by remittance from Spokane about December 23 or 24, the remittance to cover the total purchase price with the amount of interest on each bond accrued to the time of payment added, and, when payment was thus made, the bonds were to be forwarded to Lock Haven (Record, pp. 157, 158), Glenn having offered to send the bonds to Lock Haven with draft attached and Hopkins having declined the offer, stating that he would pay for and take up the bonds at Portland. (Record, p. 142.)

The other Hopkins trustee, I. A. Shaffer, Jr., approved the purchase by letter dated December 15, 1920, sent to the Morris Company in answer to Mr. Glenn's letter of December 10; and Mr. Shaffer added that Mr. Hopkins would make payment for the bonds and that the bonds were then to be sent to the Estate's office at Lock Haven.

At the time of the purchase negotiations (December 9), Mr. Hopkins assumed he was buying specific bonds then owned and in possession of the Morris Company; and Mr. Glenn, representing the Morris Company having no other information than that given by the company's advertised list likewise supposed this to be the situation. As subsequent developments showed, however, some of the issues selected were in the possession of banks as collateral to loan obligations of the Morris Company, and others were held by banks as the result of a sale which included a repurchase agreement. In one instance, the Port of Bay City 1934's, the Morris Company had none of the particular maturity specified (though entitled to secure them under a contract with the Port), and did not acquire any prior to the bankruptcy; so that the claim now made necessarily excludes the $10,000 of Bay City bonds. $19,000 of the total ($4,000 Heyburn-Paul District and $15,000 Fremont & Madison Joint), were actually in the possession of the Morris Company on December 9; and the purchase took

all that the Morris Company had of the particular maturities selected. (Record, pp. 114, 118.)

Immediately after the purchase agreement of December 9 was made, the Morris Company began assembling the bonds purchased. On December 10, the bonds actually in stock ($19,000 Heyburn-Paul and Fremont & Madison Joint), were placed in a special container and to these were added the others (except the Bay City bonds), as fast as they were gotten back from the banks; $6,000 of the Bonner County bonds were taken back from the United States National Bank of Portland and were thus set apart for the Hopkins purchase on December 14; $4,000 of the same issue (1934 maturity) with $10,000 of the Rigby bonds, $1,000 of the Heyburn-Pauls, and $3,000 of the Buhl Highways came in and were added on December 17; and the remainder, $7,000 of Buhl Highways, were received from an Oakland bank on December 22. Thus on the day last named there had been assembled by the Morris Company $50,000 of the total of $60,000 ordered; and the bonds thus assembled had been segregated from the general stock of the Morris Company and had been placed in a container in anticipation of their delivery to the Hopkins Estate. (Record, p. 82.)

On December 20, Mr. Hopkins wrote to the Morris Company from Spokane, enclosing a check for $61,000.00, stating that it was to apply on the pur-

chase of bonds made December 9, and directing the Morris Company to calculate the accrued interest on each bond (from the last coupon date to December 22, when his letter was received), and if with this interest added to the total purchase, there was an overpayment, to remit it to Mr. Shaffer at Lock Haven; or if there was a deficit to send a bill for the amount short to the Lock Haven office.

This remittance of $61,000.00 was received by the Morris Company on December 22, and it at once credited to the Hopkins Estate on its books $60,176.35, the amount of the purchase price with coupon interest to December 22, added, and prepared a check in favor of the Hopkins trustees for the overpayment of $823.65. There had previously been placed upon the Morris books a debit entry for the purchase price of the bonds, with the accrued interest, so that when the remittance from Spokane was received and credited, the books of account of the Morris Company showed the matter to be a closed transaction. (Record, p. 99.) And the subsequent audit by the receiver's accountants did not list the Hopkins Estate as a creditor. (Record, p. 100.)

Between December 22, when the payment was made and the last of the $50,000 of bonds came in, and December 24, when the concern closed its doors, preparations were made to mail the bonds to Lock Haven. It was decided not to delay forwarding

them because of the absence of the $10,000 of Bay City bonds and directions were given by Vice-President Pratt to send along the $50,000 of bonds which were ready. (Record, p. 110.)

With the addition of the bonds which came in December 22, the package had become too bulky for the special container,—the "black can" in which customers' bonds ordinarily were kept, and the package was transferred to the general receptacle, but it was held together by a large size band, underneath which there was inserted a slip of paper bearing the name "Hopkins". (Record, p. 106.) This was the situation on December 24, and all of the Morris employes having to do with the situation agreed that but for Mr. Etheridge's sudden departure and Mr. Morris' unwillingness to assume responsibility in view of the state of affairs he found on December 24, the bonds would have gone forward. (Record, pp. 75, 94, 102, 106, 107.)

There was found in the files of the Morris Company a letter dated December 22 addressed to Mr. Hopkins which seemed to indicate that Hopkins' approval of the account rendered was to be secured before the bonds were to be sent (Record, p. 110), but this letter was not mailed. Its suggestion is not consistent with the directions given by Mr. Hopkins in his letter transmitting the payment; and the testimony makes clear that but for the confusion resulting from the hasty departure of the president,

the bonds would have been in the mails en route to Lock Haven when the concern closed its doors December 24, 1920. (Record p. 110.)

The appellants' claim is that the $50,000.00 of bonds thus bought and paid for, and thus recognized by the seller as belonging to them, are their bonds. Title passed prior to the adjudication and the trustee should be required to give them up.

SPECIFICATION OF ERROR.

The court erred in holding and determining that the title to the bonds claimed by appellants had not passed prior to the adjudication of bankrupcty; and in holding and determining that notwithstanding the absolute character of the sale, the payment in full of the purchase price and the complete segregation and identification of the property sold prior to the bankruptcy adjudication, the title did not pass to the appellants; and the court erred in refusing to direct the trustee in bankruptcy to deliver over the bonds claimed to appellants.

ARGUMENT.

With the facts clearly in mind, the single question presented by this appeal, whether title passed prior to the bankruptcy adjudication, should not be difficult of solution. The intention of the seller and the buyers governs; and the intention is to be ascertained from the terms of the contract and the acts of the parties in its execution. Each case undoubtedly is determined by its own facts. But the precedents, particularly in the Federal Courts, leave no room for doubt that the existence of certain essentials compels an inference of intention to pass title. When there are combined (1) a sale absolute in terms, (2) identification of the property sold, and (3) payment of the purchase price, the thing sold becomes the property of the buyer; and this, regardless of any unfulfilled obligation on the part of the seller to make delivery.

> *H. Baars & Co. v. Mitchell,* 154 Fed. 322.
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> *McElwee v. Metropolitan Lbr. Co.,* 69 Fed. 302.
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> *Hatch v. Standard Oil Co.,* 100 U. S. 124, 136.
>
> *Harris v. Egger,* 226 Fed. 389.
>
> *Terry v. Wheeler,* 25 N. Y. 520.
>
> *Mitchell v. LeClair,* 43 N. E. (Mass.) 117.
>
> *Rohde v. Thwaites,* 6 B. & C. 388.

The conclusion of the District Court is difficult to understand. The three essentials just stated were present in the transaction under review; and not one case can be found, in English or American

legal history, which denies that a combination of these factors results in a transfer of title. As we shall later point out, the sale contract between the Morris Company and the Hopkins Estate did not place upon the seller the responsibility for delivery of the bonds sold. But if it did, no court in this country or in England has thus far held that such an obligation delayed the passing of title, where the sale was absolute, the property identified, and the price paid.

H. Baars & Company v. Mitchell, supra, (a decision of the Court of Appeals for the Fifth Circuit), is exactly in point. Indeed, it differs principally from the case at bar in that the sale contract there under consideration expressly required the seller to deliver. The seller, R. R. Cowan, contracted to sell to the Baars Company all the lumber on hand and to be manufactured at his mill at Cowan, Florida, during a certain period; and he was to deliver the lumber at Pensacola. Performance of the contract began and certain lumber was stacked in the mill yard and was known and designated as "Baars' lumber." Cowan had billed on the Baars Company for the lumber thus stacked and the Baars Company had made partial payments as required by the contract, the balances being payable upon delivery. Cowan became bankrupt and the trustee took possession of the stacked lumber. The court held that the lumber belonged to the Baars Com-

pany and referring to the Supreme Court's decision in *Hatch v. Standard Oil Company, supra,* said:

"In the light of this high authority, it seems that, in the present case, all the requisites to a binding sale were complied with. There was an undisputed agreement for one party to sell, and another to buy. The thing was specially designated, described and segregated. The price was fixed and payments were made as agreed. Although the agreement may have been to some extent executory, it being for the purchase and sale of all lumber of a certain description 'now on hand at the mill of R. R. Cowan, Cowan, Florida, and all that he will manufacture' during a specified period, yet when the lumber was manufactured and segregated and the bills of sale with full details of description were presented and accepted, and payment made according to the contract, there was a complete sale of the property designated in the bills, and the title thereto at once vested in Baars & Company; and this notwithstanding under the contract, it remained with Cowan to deliver the lumber at Pensacola and for Baars & Company to pay the balance of the price less railroad freight on delivery. As between Cowan and Baars & Company, there does not seem room for question as to the rights of the parties. Of course, in the matter now before us, the trustee of Cowan's estate in bankruptcy stands in Cowan's shoes."

"The trustee, however, contends that in the present case, the title did not pass, because the delivery was not made. The lumber had not been inspected and the insurance clause in the six months' contract indicates that the title was to remain in Cowan. As to the delivery, it is disposed of by *Hatch v. Oil Co., supra;* and see *McElwee v. Metropolitan Lumber Co.*, 69

> Fed. 305, where in a case involving a contract in many respects similar to this, Judge Lurton disposes of the questions of delivery, insurance and inspection."

It is impossible, as we think, to find any essential difference between this case and the case at bar; except that difference (the express obligation to effect delivery and the partial payment only of the purchase price), which aids appellants' contention in this case. Here there was an absolute sale, certainly after the approval of the second Hopkins trustee; there was payment in full of the purchase price, including an amount representing the earnings (the accrued coupon interest), of the bonds up to the time of payment; and lastly, there was a complete identification and segregation of the $50,-000.00 of bonds, full authority to make that identification and segregation having been given by the payment of the price and the direction to forward the bonds purchased to the Hopkins trustee at Lock Haven.

The Court of Appeals for the Fifth Circuit in its opinion in the *Baars* case adopts the rule theretofore stated by the Court of Appeals for the Sixth Circuit in the case of *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 305. In the *McElwee* case, Judge Lurton spoke for the court, which was composed of Chief Justice Taft, Circuit Judge Lurton, and District Judge Severens. The case was also one of the sale of mill products, the seller agreeing

to pile the lumber at its plant where it was to be inspected and subsequently to be shipped as directed by the buyer; the buyer promising to give promissory notes for the purchase price as the lumber was piled and before delivery, upon monthly statements rendered by the seller. The contract not only provided for later delivery by the seller, but it allowed to the buyer a final inspection at the time of delivery; and it appeared also that after the lumber had been piled and prior to delivery, insurance upon it was carried in the name of the buyer. The opinion of the court stresses the fact that payment of the purchase price was made (through the giving of the promissory notes), and the fact that the lumber was actually identified and thus appropriated to the contract. The decision says:

> "That particular lumber became appropriated to the contract and the vendee under the agreement was obliged to make his promissory note to the vendor for the price payable ninety days after date. The element necessary to a perfect and complete sale was supplied by the appropriation of a particular lot of lumber to the contract."

In treating of the effect upon the passing of title of the obligation to deliver, Judge Lurton in the *McElwee* case said:

> "Neither did the provision that the vendor should deliver at Chicago prevent the title from passing before such delivery. Undoubtedly the general rule is that if the seller obligates him-

> self as a part of his contract to deliver the property to the buyer at some specified place title will not pass until such delivery. (Citing cases.) 'Slight evidence' says Mr. Benjamin, 'is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all of the circumstances.' Benjamin, Sales, Sec. 329. Here the lumber cut, inspected, and measured was completely identified. Nothing more remained to be done to put it in a deliverable condition. It was then paid for. The delivery might be delayed by the neglect of the seller, or for the convenience of the buyer. In paying for the lumber the price of the freight was deducted. Under such circumstances, it would be difficult to say that, if the lumber should be destroyed without fault of the seller, the loss would not fall on the buyer."

The case of *Terry v. Wheeler*, 25 N. Y. 520, is said by the court (in the *McElwee* case), to be much in point. There was before the court in *Terry v. Wheeler* the question of transfer of title in a case in which there was an obligation to make delivery but where payment of the purchase price had been made. The following language from the decision is quoted by the court in the *McElwee* case:

> "No case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from passing. If the payment was to be made on or after the delivery at a particular

place, it might fairly be inferred that the contract was executory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point. I think in such case the property passes at the time of the contract, and that in carrying it the seller acts as bailee and not as owner. *Hobbs v. Carr,* 127 Mass. 532; *Weld v. Came,* 98 Mass. 152; *Lingham v. Eggleston,* 27 Mich. 324; *Underhill v. Booming Co.,* 40 Mich. 660; *Booming Co. v. Underhill,* 43 Mich. 629, 5 N. W. 1073; *Steam Mill Co. v. Brown,* 57 Me. 9; *Hatch v. Oil Co.,* 100 U. S. 135; *Dyer v. Libby,* 61 Me. 45."

This is the law in the Fifth Circuit and in the Sixth Circuit, and it is the rule accepted generally; and we repeat that no reported case in England or America, before or after the adoption of the Uniform Sales Acts, denies it. The combination of a sale absolute in terms, identification of the property sold and payment of the purchase price, compels an inference of intention to transfer title, regardless of any question of delivery or obligation to deliver.

With this principle in mind, let us examine the facts shown by the record in this case to ascertain to what extent there were present the three essentials necessary to the passing of title.

(1) That an absolute sale was contemplated by the Morris Company and the Hopkins trustees is not questioned. The parties on December 9 spoke

not of an agreement to purchase, but of a purchase, subject only to the approval of the co-trustee, Mr. Shaffer. This approval was given by letter dated December 15. The Morris Company was selling and the Hopkins trustees were buying bonds which the Morris Company had advertised as belonging to it and for sale; and with an identification of the bonds and the payment of the price, the transaction would be complete.

(2) No dispute exists over the presence of a second essential, the payment of the purchase price. On December 20, Mr. Hopkins sent from Spokane a check for $61,000.00 to apply, as his letter said, "on the purchase of bonds made December 9." He directed that any overpayment or deficit (depending upon how much interest had been earned on each bond from its last coupon date to the date of the remittance), should be adjusted with the Lock Haven office. The amount necessary to pay for the entire lot (including the $10,000.00 Bay City bonds), turned out to be $60,176.35, so that the purchase price of the $50,000.00 of bonds claimed was on December 22, paid in full.

(3) The third and only other essential to the transfer of title was the identification of the property sold. The sale was absolute, at least when the letter of Trustee Shaffer of December 15, was received, and the purchase price was paid on December 22; and it remains to be seen whether on or

about the time of payment and before the bankruptcy adjudication, the bonds were sufficiently identified and, in the language of the Supreme Court in *Hatch v. Standard Oil Company,* "appropriated to the contract."

Mr. Hopkins on December 9 directed the Morris Company to forward the bonds, after they had been paid for and thus "taken up", to Lock Haven; and the same direction was given by Mr. Shaffer in his letter of December 15. Neither of the Hopkins trustees contemplated going to Portland when the money was paid, so that this direction authorized and required the Morris Company to select the particular bonds (where the purchase did not include all the Morris Company owned of any particular issue), to be appropriated to the contract.

On December 10, all of the specified bonds which were actually in the possession of the Morris Company ($19,000) were taken from the general stock and put in the container ordinarily used for customers' bonds. To these were added on December 14, $6,000.00 more taken back from a Portland bank. On December 17, $18,000.00 additional came in from a Seattle bank and were included and on December 22, $7,000.00 was secured from an Oakland bank; so that on December 22 there had been collected in and set aside for the purpose of filling the Hopkins purchase all of the Rigby, Buhl Highway, Heyburn-Paul District, Fremont & Madison Joint

and Bonner County School District bonds, totaling $50,000.00. The Bay City bonds ($10,000.00), although paid for, were not secured and, of course, were never identified or appropriated to the contract.

In a number of instances no selection of particular bonds was required, since the purchase called for all that the Morris Company owned of the particular issue or maturity. This was true of the Fremont & Madison Joints, $15,000.00, the Heyburn-Pauls, $5,000.00, the Rigby 1933's, $4,000.00, and the Bonner County 1933's, and 1934's, $7,000.00. Where less than the total Morris Company holding was specified, the required number was taken out. To illustrate, the Morris Company owned Bonner County 1932's, Nos. 16, 17, 18 and 19. The Hopkins order called for three, and Nos. 16, 17 and 18 were, on December 14, placed in the special container for the Hopkins purchase.

Thus on December 22, the day on which the purchase price was paid in full, all of the bonds now claimed had been set aside for the specific purpose of appropriation to the Hopkins sale contract; and there were combined then the three essentials necessary to a completed transaction—to the passing of title—(1) an absolute sale, (2) payment of the purchase price, and (3) complete identification of the property sold.

But before the bankruptcy, there were additional steps taken which made clearer the appropriation of these $50,000.00 of bonds to the Hopkins contract. When the last lot came in on December 22, and it was known that the Bay City bonds could not be secured until later, it was decided to send on at once to Lock Haven the bonds then ready. The bonds were taken from the special container, made into a package, and the package was labelled "Hopkins." A check for the overpayment of $823.65 was written, but there was no one then in authority to sign it. Mr. Etheridge had left the city secretly and Mr. Fred Morris—a stranger to the recent activities of the company—had taken charge. Bankruptcy was imminent and Mr. Morris would assume no responsibility.

The bonds were not mailed, but only the impending bankruptcy prevented the act of mailing. They were made into a package and labelled with the name of their owner, ready for the expected mailing; and these acts were authorized by and were in conformity with, the buyer's directions, given December 9 and December 15. We submit that nothing short of an actual manual delivery of the bonds could accomplish such a complete identification of the property sold—so complete an "appropriation to the contract."

Under the Uniform Sales Act and under *Hatch v. Standard Oil Company*, 100 U. S. 124, 134, it

could well be urged that in all cases where no selection of particular bonds was needed (where the sale was of all that the Morris Company owned), title passed when the sale became absolute and before the purchase price was paid. And as to the others (where three out of a lot of four were bought), there is abundant authority for the proposition that since the bonds were alike in quality and value (fungible goods, under the Uniform Sales Acts), and there was no choice or selection contemplated by the parties, title to an undivided interest in the lot passed the moment the sale became absolute. Williston on Sales, Sections 156, 158; 24 Ruling Case Law, p. 25.

But the circumstances of this case make it unnecessary to invoke either of these rules. Before the bankruptcy all of the bonds claimed were paid for in full and pursuant to the buyer's direction they were segregated and gotten ready for mailing; they were identified with the buyer's name and were fully appropriated to the contract.

Payment of the purchase price could not alone result in the passing of title. The $10,000.00 of Bay City bonds were paid for but title was not acquired. But as to the bonds claimed, when the buyer's act of paying the price was coupled with the seller's act (preparatory to mailing pursuant to the buyer's directions), of setting apart and identifying the property bought, there was supplied every element necessary to a perfect and complete sale.

Ordinarily one who pays for an article purchased before it is delivered to him does so in order that he may acquire ownership at once. A man who selects a suit of clothes from the stock of a merchant and pays for it undoubtedly intends by the payment to become at once the owner of the particular suit selected; and the passing of title is unaffected by the fact that the merchant may have obligated himself to make delivery. Similarly, if the purchase is of one of a number of suits all alike, and the buyer sends the price to the merchant and directs him to forward one out of the lot, there is no reason to doubt the intention to acquire title without waiting for the actual change of possession. Indeed, it is difficult to understand why a buyer should pay over his money before getting the thing bought, except for the purpose of acquiring ownership immediately. As suggested by the court (Judge Lurton) in the *McElwee* case, retention of title to the property by the vendor after payment, would leave the vendee without security for the payment he had made.

The payment which was made by the Hopkins trustees and the reasons for that payment, leave no room for doubt as to the buyer's intention to acquire title at once. When the transaction was negotiated December 9, Mr. Glenn, the Morris representative, offered to send the bonds, with draft attached, to the Lock Haven office of the Estate. Mr. Hopkins declined this offer, stating that he would

make payment for the bonds at Portland, whereupon they were to be sent to Lock Haven. Why should he prefer to pay over $61,000.00 a week or more before the Estate was to get actual possession of the bonds? The answer is obvious. The bonds were earning interest, as evidenced by the coupons attached. The Hopkins money was idle and the trustees wanted it put to work at once. Each day's delay in acquiring ownership of the bonds meant the loss of that much of the earnings. The purchase price was paid in advance of delivery *for the express purpose* of acquiring immediate ownership and the consequent right to the earnings of the bonds from the time of payment on.

That the intention to transfer title without waiting for delivery was shared by the Morris Company is equally clear. Mr. Hopkins upon transmitting $61,000.00 on December 20, directed the Morris Company to calculate the accrued interest and ascertain the exact amount to be paid. The Morris Company did this, charging the Hopkins Estate with an amount representing the interest accrued on each bond from the date of its lowest numbered coupon to December 22.

By thus retaining the moneys earned by the bonds up to December 22, the Morris Company clearly indicated its intention to relinquish ownership and transfer title as of that date. On its books of account a debit item was posted charging the

Hopkins Estate with the purchase price, plus the interest earned to December 22, and a credit entry was made showing the payment in full of the amount thus debited; and according to the books, the purchase was a closed transaction.

Intention alone may not transfer title. The payment made and the interest adjustment applied as well to the $10,000.00 of Bay City bonds, and both parties desired to pass title to these as well as the other bonds. The Morris Company itself did not get title to them and the intention to transfer title could not be carried out. But when the clearly evidenced intention of both parties was coupled with an actual segregation and identification of the $50,000.00 of bonds which *were* gathered together for that purpose, and when this act of segregation and identifying was done in pursuance of the buyer's direction to send the purchased bonds on, these bonds certainly became the property of the buyers.

There was left undone merely the transfer of physical possession. Whether the responsibility for effecting delivery at Lock Haven was upon the seller, seems unimportant. Under the law, both the common law and the Uniform Sales Act, the intention of the parties governs. To say that title to this property could not pass until the change of physical possession is to deny to the buyer and the seller the right to do what they intended to do and did do—to bring into combination prior to the bank-

ruptcy (1) an absolute sale, (2) payment of the purchase price, and (3) identification of the property sold, and thus to transfer the title.

Why then did the trustee in bankruptcy refuse to give up the bonds? And upon what did the District Court base its conclusion that title had not passed? Chief reliance seems to have been placed upon the theory that the sale contract obligated the seller to make delivery, and that because of the unfulfilled obligation to deliver, an intention to defer the transfer of title must be inferred. In addition, the claim was made, and it was noticed by the court, that the segregation by the Morris Company was insufficient because apparently revocable and unauthorized. We shall discuss these two propositions in the order stated.

I.

In support of the claim that delivery was necessary to pass title to the bonds sold, Rule 5 of the Rules of Intention of the Uniform Sales Act is invoked. This act as adopted in Oregon does not differ from the Sales Act in effect in other states and in England. The five rules designed to aid in ascertaining intention on the question of passing of title appear as Section 8182, Oregon Laws. The statute is specific in its declaration that these rules are not binding rules of construction, but are available only where a different intention does not ap-

pear, and Section 8181 of the Oregon Code says that:

> "For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case."

Rule 5, Section 8182, is as follows:

> "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

1. It should first be noted that the Uniform Sales Act was not intended to change the law on the subject of transfer of title as it had been declared by the courts of England and America. It has always been the law that, a contrary intention not appearing from the contract or the circumstances, a purchase of an article to be delivered by the seller imports an intention to pass the title upon delivery. Change of possession is the most frequent evidence of change of ownership. Judge Lurton in *McElwee v. Metropolitan Lumber Company* (whose statement of the rule we have quoted, *supra*), points out that:

> "Undoubtedly the general rule is that if the seller obligates himself as a part of his contract to deliver the property to the buyer at some specified place, title will not pass until such delivery."
>
> 69 Fed. 302, 305.

But the very cases which state this general rule (and *McElwee v. Metropolitan Lumber Company* is a conspicuous example), make clear that when before the required delivery, the purchase price is paid and the property segregated and identified, a contrary intention *does* appear. The parties have made clear by their acts that despite the unfulfilled obligation to deliver, they intended the title to pass at once, and this intention governs.

The following observation of the court in *Terry v. Wheeler,* 25 N. Y. 520, is quoted with approval in *McElwee v. Metropolitan Lumber Company* and is in point:

> "If the payment was to be made on or after the delivery at a particular place, it might fairly be inferred that the contract was executory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he is engaged to transport it to a given point."

Williston on Sales (page 409), in discussing this particular rule of intention of the Uniform Sales Act, points out that the significance of an obligation to deliver readily yields to circumstances showing an intention to pass title at once; and he adopts the statement of Benjamin on Sales, which was referred to with approval by the Court of Appeals of the Fifth Circuit in the *McElwee* case. Quoting from the text of Williston, at page 409:

> "It must constantly be borne in mind that the rules here spoken of, like others in the section of the Sales Act under consideration, are rules of presumption merely and will yield to proof of a contrary intention. Probably the statement of Benjamin, quoted with approval by the Circuit Court of Appeals, accurately sums up the matter. 'Slight evidence,' says Mr. Benjamin, 'is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all the circumstances.'"

Thus the rule prevailing in the Fifth Circuit and the Sixth Circuit is equally applicable under the Uniform Sales Acts. Mr. Williston (who drafted the Uniform Sales law), makes clear that the intention of the parties and the acts done pursuant to their intention must govern; and the courts in the cases cited have determined that payment of the purchase price and identification of the property sold indicate an intention to transfer title regardless of the question of delivery. The Uniform Sales Act therefore adds nothing to appellee's case. Without it he is entitled to invoke the rule that unless a contrary intention appears, an unfulfilled obligation to deliver defers the passing of title; and we are brought back to the question of what circumstances indicate such contrary intention.

2. *H. Baars & Company v. Mitchell, supra,* the *McElwee* case, and other cases which might be cited,

fully answer this question. Regardless of any obligation, supposed or real, to deliver, the combination of an absolute sale, payment of the price and identification of the thing sold shows a purpose to transfer title at once. And we repeat again that no case can be found holding that with these three essentials present, title does not pass.

The circumstances of the Hopkins purchase demonstrate the reasonableness of the rule of these cases. The Hopkins trustees chose not to defer taking title until delivery of the bonds, preferring to pay for them and "take them up" in advance of delivery, so that they might receive the income produced by the bonds. The Morris Company acquiesced in this as shown by their book entries, and set the bonds apart and identified them as property of the Hopkins estate. If we are to attribute to these acts their ordinary and usual meaning, surely it cannot be doubted that both parties intended the ownership of these bonds to change when they were thus paid for and set aside. In this situation the rule of the Federal cases cited furnishes a safe guide for the disposition of this case. Payment of the purchase price with accrued earnings added, was combined with a complete identification of the property sold. An intention to transfer title immediately was clearly evidenced and the supposed obligation to deliver is without significance.

3. The case has been discussed thus far as if the Hopkins purchase may have included an obligation

on the part of the Morris Company to make delivery of the bonds at Lock Haven. We shall briefly review the circumstances which make clear, as we think, that no such obligation was intended by the parties to be imposed upon the Morris Company.

The basis for this claim of the trustee in bankruptcy is the statement which appears in the letter written by Mr. Glenn of the Morris Company to Mr. Shaffer at Lock Haven, dated December 10, which reads as follows:

> "The bonds above mentioned are to be delivered to you about December 23 or 24, and we are to send the same by registered mail insured, addressed to the Estate of A. C. Hopkins, Lock Haven, Pennsylvania."

The District Court's memorandum (Record, p. 33), says that:

> "The contract is contained in the letter of the bankrupt to Mr. Shaffer of December 10, and his reply thereto."

And the court says that:

> "It is therefore quite clear that it was the intention of the parties that the bonds were to be forwarded by the seller by registered mail to the buyer at Lock Haven, Pennsylvania."

From this premise the conclusion is drawn that the title would not pass until the bonds had thus been forwarded.

The record clearly indicates that the Morris Company's letter of December 10 was not intended to be a reduction of the contract to writing; and the

oral negotiations, and particularly the memoranda made by Mr. Glenn for the Morris Company during the negotiations of December 9 must be resorted to as well, in order to determine what the parties intended on the subject of delivery. A writing which bears upon a transaction theretofore orally made, even though sufficient under the statute of frauds to bind the parties signing it, is not to be taken as the complete exposition of their intentions unless the writer and the addressee intend that this shall be so.

Wigmore on Evidence, Secs. 2429, 2430.
Jones on Construction of Contracts, Sec. 134.
Bouchet v. Oregon Motor Car Company, 78 Ore. 230.

The following statement of the rule by Jones on Construction of Contracts (Section 134), is adopted by the Oregon Supreme Court in the *Bouchet* case:

> "The test of the completeness of the writing, proposed as a contract, is the writing itself. If this bears evidence of careful preparation of a deliberate regard for the many questions which would naturally arise out of the subject matter of the contract, and if it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract. In every case, therefore, the writing must be critically examined in the light of its surrounding cir-

cumstances with a view of determining whether it is a memorial of the transaction."

Therefore if the Morris Company's letter of December 10 was not intended as a memorial of the transaction, the court is not limited to it and to its answer in ascertaining what obligations the parties intended their contract to impose. On this point, it should first be noted that the oral negotiations were conducted for the Hopkins Estate by Mr. Hopkins of Spokane. He it was who made the purchase, conditioning it only upon the approval of his co-trustee. When an agreement was reached on the afternoon of December 9, Mr. Hopkins directed Mr. Glenn to forward to Mr. Hopkins' co-trustee, Mr. Shaffer, a description of the bonds, together with the legal opinion of counsel covering each issue, explaining that Mr. Shaffer "always had approved my selections, and I would send him a list—that inasmuch as we were acting as co-trustees, I wanted him to have a list of the bonds and the legal opinion on the bonds." (Record, p. 151.) Mr. Hopkins himself sent to Mr. Shaffer immediately a list of the bonds selected so that they might be checked against the list to be furnished by Mr. Glenn.

Thus it appears that as between the parties to the oral negotiation on December 9, there was no thought of reducing the contract to writing; and the letter which was written the next day by Mr. Glenn of the Morris Company was merely a compliance with Mr. Hopkins' direction to place in Mr. Shaf-

fer's hands information regarding the bonds selected. There was no intention to have this letter incorporate exactly all of the terms and conditions of the contract of purchase. This is evidenced also by the fact that the Morris Company did not furnish to Mr. Hopkins a copy of the letter so written to Mr. Shaffer. (Record, p. 144.) Mr. Hopkins had made the deal and if it was his intention that the Morris Company should reduce the bargain to writing, without doubt he would have insisted that a copy of the writing be placed in his hands.

The purpose of the letter of December 10, as already stated, was to transmit to the co-trustee at Lock Haven a list of the bonds purchased, information regarding their worth and the legal opinions on the validity of each issue; what was intended was to secure approval not of the *terms* of the purchase, but of the decision to take the particular bonds listed. It follows that in order to ascertain what obligations the parties intended to assume, recourse must be had not only to the letter thus written and its reply, but also to the oral negotiations of December 9.

When the selection of bonds was made by Mr. Hopkins on December 9, he advised Mr. Glenn that the Hopkins Estate had an acceptance coming due about December 23 or 24, and that he proposed to take up the bonds at that time. Mr. Glenn suggested that the bonds could be forwarded to Lock

Haven with sight draft attached, but Mr. Hopkins declined that offer and stated that:

> "I want to send the money here and take the bonds up here." (Record, p. 142.)

If the court will examine the memorandum of the sale made by Mr. Glenn on December 9 (Petitioners' Exhibit 6, Record, p. 177), full corroboration will be found for the testimony of the two men on these points. Upon Mr. Hopkins' statement of his desires regarding payment and disposition of the bonds, Mr. Glenn wrote down:

> "Will arrange to take up about Dec. 23-24.
>
> "Make all statements to Lockhaven. Send copy to Spokane. He will send check to cover.
>
> "Send circular and copy of attorney's opinion.
>
> "Get off tomorrow.
>
> "I. A. Shaffer, Jr., Lockhaven, Pa.
>
> "Ship bond to Est. of A. H. Hopkins, Lockhaven, Pa."

This memorandum summarizes all that was said on the subject of payment and taking up of the bonds, and their delivery; and we are to determine whether the directions thus given and accepted contemplated an obligation on the part of the Morris Company to lay down the bonds at Lock Haven, Pennsylvania, and retain title to them until then, or whether the real intention was to transfer ownership and the right to the earnings of the bonds, by the act of "taking them up" when the purchase price should be paid and then to have the Morris

Company place them in the mail registered and insured, addressed to the Hopkins Estate at Lock Haven.

Surely a seller of personal property can accept directions of the buyer, after he has bought and paid for the property, as to where it is to be sent, particularly where the inexpensive mail service is to be used, without incurring an obligation under which the seller would remain responsible for the property until it reached the hands of the buyer. Transactions of this kind are numerous in ordinary business life. No question of transportation expense is involved, and the buyer either holds his money and the property is sent him C. O. D. or through some bank with draft attached, or he sends his money on, *so as to become the owner immediately,* and gives directions as to what disposition he wants the seller to make of the property acqaired. In the latter case, the service required of the seller —preparation for mailing, registering, and even insuring, according to the practice of bond houses, is merely the customary service incidental to the sale, (Record, p. 161), and imports no obligation to deliver which might defeat the evident intention to pass title at once.

The Morris Company's letter of December 10, taken in conjunction with the memorandum of Mr. Glenn made December 9, and his explanation of the matter on the witness stand (Record, pp. 158, 163),

show that the Morris Company shared Mr. Hopkins' understanding of the transaction in this respect. There was no thought on the part of the Morris Company that the bonds were to be set down in Lock Haven by December 23 or 24, and no attempt was made to forward them so that they would arrive at that time. Again, the statement explaining the manner of sending the bonds is not consistent with the idea that the Morris Company was assuming responsibility for the delivery. If the latter had been true and the Morris Company was to be responsible for the bonds until they reached Lock Haven, the Hopkins Estate would not have been particularly interested in the fact that they were to be registered and insured during transportation.

But for the thoughtless selection of the term "to be delivered" in the letter of December 10, it is doubtful if this theory of an obligation to deliver would ever have been suggested. It is perfectly clear from the record that the reference to *delivery* December 23 or 24 referred not to the change of physical possession of these bonds, but to the payment of the purchase price and the then change of ownership. The language used by Mr. Hopkins and written in Mr. Glenn's memorandum said that the buyer was "to take up about December 23-24." The date specified was the time when the Hopkins Estate would be prepared to consummate the transaction; and it was expressly understood that the purchase was to be concluded at Portland by the

forwarding of the money from Spokane to Portland instead of at Lock Haven by the shipment of the bonds with draft attached. Mr. Glenn in transmitting the list of bonds and information regarding them to Mr. Shaffer added the information given him by Mr. Hopkins that the purchase was to be concluded by December 23 or 24; and that when it was so concluded, the Morris Company was to mail the bonds to the Estate's office at Lock Haven. This was all that was meant and all that could be meant by the statement in the Morris Company's letter that the bonds were "to be delivered" by December 23 or 24.

With this understanding of the transaction, the reference in the letter of December 10, to the shipment of the bonds by "registered mail, insured, addressed to the Estate of A. C. Hopkins, Lock Haven, Pa.", and the instructions given in the answering letter of Mr. Shaffer to "ship the bonds described in your letter to us" amount to no more than the direction of the buyer as to the disposition to be made of the property purchased. As the record shows, Morris Brothers commonly looked after registering and insuring bonds forwarded on behalf of customers. It was the universal practice to register and insure all bonds mailed (Record, pp. 113, 161-162). This service involved little expense and its assumption by the Morris Company has no significance. Mr. Hopkins' instructions were simply

that the bonds were to be sent to the Hopkins office at Lock Haven. There was no stipulation or condition imposed on the Morris Company of obligation to assume responsibility for the transportation of the bonds to destination. The parties unquestionably contemplated simply the usual transmission of the bonds by mail after they were paid for and after they became the property of the Hopkins Estate.

A contrary view would make it impossible for a buyer of bonds to have the bonds he had purchased (after they were fully paid for), sent to him or elsewhere through the mail without danger of defeating the very purpose intended by the payment of the price. If the bonds were scarce, it might be of greatest importance that ownership should be secured by forwarding the purchase price at once; and it is a strange rule which would deny that right of ownership merely because it happened to be convenient to have the bonds forwarded by mail to another destination.

The chief reliance of the trustee in bankruptcy is this supposed obligation to turn over the bonds to the Hopkins Estate at Lock Haven. The theory that such an obligation was a part of the sale contract does violence to the clearly indicated intention of the parties. The "delivery" contemplated for December 23 or 24 was the consummation of the sale by the payment of the price; and this actu-

ally occurred on December 22. The forwarding of the bonds to Lock Haven was to follow this delivery or "taking up" of the bonds, and there was no term or condition of the contract requiring delivery at Lock Haven.

II.

The trustee in bankruptcy contends that there was not a sufficient segregation of the bonds to accomplish an appropriation to the contract, and that what was done in this respect was not assented to or authorized, expressly or impliedly, by the Hopkins Estate.

1. It is not denied that the Morris Company actually set aside certain bonds on account of the Hopkins purchase and labeled these bonds with the name "Hopkins" and made entries on its books of account which (as we think) show that the Morris ownership ended December 22. It is suggested, however, in support of the first of these two objections, that the sale was not one of specific bonds, but of a number of bonds of a certain kind and that the Morris Company, after the segregation which took place, was at liberty to make substitutions at will, subject only to the requirement that the specified number of bonds of the description ordered be delivered.

Baars & Company v. Mitchell, supra, and *McElwee v. Metropolitan Lumber Company, supra,*

completely answer this suggestion. In each of these cases, no specific lumber was bought and there was nothing to prevent the seller, after the lumber had been placed in the piles, from making substitutions or changes; and if the substituted lumber conformed to the contract requirements, obviously the purchaser would make no complaint. In every case of the purchase of one or more of a number of similar articles, the seller, as long as the property remains in his possession, can make changes without possibility of complaint by the buyer. But this cannot defeat the intention of the buyer to acquire ownership of the purchased article at once where he pays his money for that express purpose. This is illustrated by *Mitchell v. LeClair*, 43 N. E. (Mass.), 117, involving the sale of sixty tubs of butter out of a large quantity, all of like quality, and by the English and American cases collected in 24 Ruling Case Law at page 27. In *Mitchell v. LeClair*, the seller set aside the number of tubs of butter called for by the buyer's order, marking each with the buyer's name, and sending him at once a bill calling for immediate payment. In a frequently cited English case (24 Ruling Case Law, p. 27), the sale was of barley, and the buyer sent the seller sacks for use in delivering. The seller filled the sacks, but because of impending bankruptcy, did not deliver and turned the barley back. In both of these cases, the title was held to have passed, although the sellers, as in the *Baars case* and the *McElwee* case, had

every opportunity of making changes or substitutions.

If because of the seller's opportunity after segregation and before delivery to make changes, the segregation is to be held revocable and therefore not binding, it results that in no such a sale can the buyer secure title by payment of the price, unless he takes possession or in some manner makes it impossible for the seller to effect changes in the property set aside. This is not the law. The trustee in bankruptcy (and the District Court), have confused the opportunity of making changes in the segregated property with the right to make such changes. When the buyer pays the price and directs the seller to make disposition of the property purchased, the seller must necessarily take out of the stock of similar articles the number called for by the purchase. When he does this, he has made the necessary appropriation. Thereafter the property set apart belongs to the buyer, but so long as it remains in the seller's possession, obviously he has the opportunity (but not the legal right), of making substitutions. As a practical matter, the buyer could have no complaint to make if the substituted property be identical in character and value with that taken back. To this extent the segregation is not irrevocable. Nevertheless, it is a specification of the goods to which the contract is to attach. The Supreme Court of the United States in *Hatch v. Standard Oil Co.*, 100 U. S. 124, 136, said:

> "After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods to the contract, as the sole element deficient in a perfect sale is thus supplied."

Williston on Sales, Sec. 274, notes that the word appropriation is not so well suited to the purpose as the word specification. He says:

> "Specification is the proper word to indicate merely that definite goods have, either by the contract or subsequently, been fixed upon as the subject matter of the sale."

We can find nothing in the fact that the Morris Company could have made changes (although none were made), after the segregation, which destroys the significance of the clear and unquestioned specification of the bonds set aside for the Hopkins purchase; and the *Baars* case in the Fifth Circuit and the *McElwee* case in the Sixth Circuit, and many other English and American cases establish that a specification of the property, although an opportunity for change remains in the seller, passes title.

It is to be noted, too, that the parties to the Hopkins purchase in fact understood that they were making a bargain and sale of specific bonds. \$31,000.00 out of the \$60,000.00 covered by the contract comprised the only bonds of the particular issue and maturity owned by the Morris Company at the time. As to all the rest, the Morris Com-

pany claimed it owned or controlled (and with the exception of the Bay City bonds, did own or control), a certain number of the issues described; and the Hopkins Estate was sold three out of four, or four out of five of each of the issues or maturities thus owned or controlled.

As to the $31,000.00 first referred to, apparently there was no necessity for any specification. The Morris Company owned fifteen Fremont & Madison County Joint School District bonds. This was the Morris Company's entire holding and by the contract with the Hopkins Estate, it sold all of these bonds. Certainly when the Hopkins Estate paid over the purchase price (if not at the moment the approval by Mr. Shaffer made the sale absolute), the title passed. It may be that there were other bonds of this issue on the market so that the Morris Company could have retained the fifteen on hand December 9 and could have filled the Hopkins contract by outside purchases; and the Hopkins Estate would have been none the wiser. But the fact remains that the Morris Company sold the Hopkins Estate the fifteen bonds it had advertised as on hand and for sale, and the possibility of making substitutions could not affect the rule of law applicable. In point of fact, the record does not disclose whether there were other such bonds on the market and whether there was any such possibility of effecting changes. In any event,

there is no reason to doubt the intention of the parties that specific bonds were sold. As to the remainder of the purchase, the Hopkins Estate bought some, in fact nearly all, of the particular bonds advertised and held for sale by the Morris Company.

We find it difficult in this situation to agree with the District Court's statement that specific bonds were not sold but that the Morris Company was merely to supply a number of bonds of certain issues and maturities. However that may be, appropriation to the contract (under the rule of the *Hatch* case), was all that was necessary to make the sale complete. To accomplish this appropriation, the Morris Company specified the particular bonds out of those on hand (or collected in), which were to be used to fill the Hopkins order. Whether after the purchase price was paid and the parties by their actions showed an intention to change the ownership, the Morris Company could have made substitutions without criticism from the purchaser, seems unimportant. All of the elements necessary to a complete transaction had been supplied by the definite act of specification combined with the receipt of the purchase price. Under *Hatch v. Standard Oil Company* and other cases above cited, the transaction was consummated and the title passed.

2. The claim that there was no assent by the Hopkins Estate to the act of the Morris Company in specifying the particular bonds for appropriation to the contract needs but little comment. On the question of authority to make the appropriation, Williston on Sales (at page 382), says:

> "The buyer rarely expresses his consent to an appropriation in definite words. On the contrary it is necessary to resort to inference from the terms and circumstances of the bargain."

The act of setting apart the bonds and their identification was necessary before the Morris Company could mail them, after they had been paid for, to the office of the Hopkins Estate at Lock Haven; and both trustees had given explicit directions to the Morris Company to send the bonds to Lock Haven as soon as the purchase was consummated. After the bargain was made, December 9, Mr. Hopkins did not contemplate returning to Portland, either at the time of the payment of the price or at any time before the bonds were to be forwarded, and he and Mr. Shaffer both directed the Morris Company to send on the bonds to Lock Haven. The segregation of the bonds, their identification as Hopkins bonds, and the act of collecting them into one package were all necessary steps in the carrying out of the directions given by the purchaser. Payment of the purchase price alone would be sufficient ordinarily to authorize the seller to set aside the property to be used in fulfillment of the contract;

particularly where there was no choice to be exercised as to what particular articles out of a number all alike should be used. Here there was not only the authority given by the payment, but there was an express direction to the seller which of necessity required it to select and set apart (where less than all of the bonds owned were purchased), the property to be appropriated to the contract.

If any authority is needed for a proposition so clear, it is furnished by *Baars & Company v. Mitchell, supra,* and *McElwee v. Metropolitan Lumber Company,* in both of which cases the appropriation was by the seller without any more authority from the buyer than that inferred from the circumstances of the contract. Indeed, almost any one of the American or English cases cited by the text writers could be selected at random and less authority would be found for the seller's act of segregation than appears in the case at bar. An illustrative American case is *Mitchell v. LeClair,* 43 N. E. (Mass.), 117. This involved a sale of butter out of a larger quantity owned by the seller and the seller's authority to segregate was given only by the buyer's telegram accepting the offer to sell. The court said:

> "Upon the receipt of the defendant's telegram accepting their offer, they were impliedly authorized, as the defendant's agents, to set apart and appropriate to him the goods called for by the contract. This they immedi-

> ately did, weighing the butter, setting it apart, and marking each tub for the purpose of designating it as the defendant's property. They then at once sent him a bill of all of it, marked, 'cash on demand.' This completed the sale and passed the title." (Citing cases and also citing Benjamin, Sales (6th Am. Ed.), 294-298).

We repeat that in reviewing the acts of the buyer and the seller in this case, the court cannot but give to their acts that meaning which would ordinarily be inferred from any like business transaction. It can hardly be doubted that nowhere but in a hotly contested law suit with property of substantial value at stake, would any one assert that a buyer, who had paid his money and had directed the seller to forward the goods purchased, had not authorized the seller to select and set apart the property purchased. The assertion that authority was withheld is almost absurd when made with reference to bonds differing in not the slightest particular one from another. The Hopkins Estate bought three of the four Rigby bonds, 1932 maturity, owned by the Morris Company. Is it conceivable that the Hopkins trustees had a choice as to which three out of bonds Nos. 9, 10, 11, and 12, they wanted? To say that they did have a choice and that they did not authorize a segregation by the seller does violence to the plainly expressed intention; and in the circumstances, it is difficult to take the argument seriously.

No direct authority or assent is ever thought of by the buyer where the sale is of a given quantity of goods of a standard or certain quality. Direct authority from the buyer is contemplated only when the sale is of one or more of a number of articles regarded by the parties as differing in value.

Johnson v. Hibbard, 29 Ore. 184.
Chapman v. Shepard, 39 Conn. 413.
Lingham v. Eggleston, 27 Mich. 324.
24 Ruling Case Law, Sec. 285.

These cases are authority for the rule that where the sale is of a specified quantity of articles out of a larger quantity of the same kind, character and value, any act of the seller in marking or identifying the property is a sufficient specification to supply the element needed to make the transaction a completed sale. As to such of the Hopkins purchase as took less than the entire holding of the Morris Company, obviously the Hopkins Estate was not concerned with the question of which three out of four bonds, all exactly alike except as to the bond numbers, were to be supplied. The Hopkins trustees paid for the bonds and directed the Morris Company to send on three out of the four; and this surely gave abundant authority to the Morris Company to select the particular bonds to be appropriated to the contract.

The decisions of the Court of Appeals in the Fifth and Sixth Circuits, founded as they are on the decision of the Supreme Court of the United States in *Hatch v. Standard Oil Company, supra,* state the rule which should govern the disposition of this case. According to the principle they lay down, the combination of a sale absolute in terms, payment of the purchase price, and identification of the property sold demonstrates an intention to pass title without waiting for delivery, even in cases where the seller has obligated himself to deliver; and no American or English case can be found to the contrary. In the case at bar, these essentials are clearly present. In addition, the adjustment of the accrued earnings of the bonds as of the time of the payment of the purchase price, removes any doubt of the intention of both to transfer title at that time. This intention was carried out by the authorized specification by the seller of the bonds appropriated to the contract. If there was an obligation on the part of the seller to make delivery (and clearly there was no such obligation), its significance was outweighed by the circumstances thus demonstrating the intention to transfer title before delivery.

The intention thus indicated should control. The trustee in bankruptcy stands in the shoes of the Morris Company. If bankruptcy had not ensued, the Morris Company certainly could not have as-

serted title to the bonds once they were paid for and appropriated to the contract; and the trustee in bankruptcy should not be permitted to retain the bonds which the Morris Company clearly understood were the property of the Hopkins Estate.

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